

III. THE POLICY ISSUES: A BRIEF OVERVIEW

Policy debates relating to broadband technology have raged in Congress, before the FCC, and in the press. These arguments, however, have often led to confusion rather than clarity. This section reviews and summarizes the policy issues raised.

The most prominent policy questions have involved the cable industry and efforts by ISPs and others to offer services over cable systems. Other questions relate to the provision of DSL services, while still others are more general in focus. The issues discussed below will be roughly grouped into these categories. The most prominent issues – involving the access to cable issue – are discussed in greater detail in Part IV.

Resolution of the cable- or DSL-specific issues, however, could have direct implications in other technology areas. For example, how policymakers resolve the “access to cable” issues could affect the development and deployment of wireless technology. Thus, these policy decisions should be made with a broad perspective over the entire Internet.

A. Cable-specific Issues

The key broadband issues that specifically relate to Internet access over cable systems are rooted in the broad policy question of whether cable-based Internet access should be treated similar to cable television service (which has been largely unregulated) or similar to telephone service (which has been subject to significant regulation). Some cable companies have argued that additional regulations should not be imposed on the cable industry, even if it is providing Internet access. Some “open access” proponents have argued that the regulations applicable to the telephone system has been vital to the growth of the Internet, and similar regulations should be imposed on Internet access over cable. Finally, some local telephone service providers have argued that the incongruity between these two differing levels of regulation should be resolved by *reducing* regulations applicable to telephone service, rather than imposing regulation on cable-based Internet service.

1. Proper Regulatory Classification of Internet Service Provided over a Cable System

A logical starting point to any analysis of regulatory action is a look at where cable-delivered Internet service fits into the current regulatory scheme. The key question is whether Internet-over-cable is a “cable service” (and thus subject to minimal regulation) or a “telecommunications” or “information” service (subject to different regulatory schemes). The FCC has to date avoided deciding the issue. The United States Court of Appeals for the Ninth Circuit, however, recently considered the issue and concluded that cable-delivered Internet service

is a “telecommunications service.” This appears to have pushed the FCC to consider the issue directly. Although a resolution of this question may not be essential to a resolution to the “third party access” issue discussed below, any definitive resolution of this question would have a significant impact on the third-party access debate. This issue is discussed in greater detail in Part IV below.

2. Third Party Access to Upgraded Two-Way Cable Systems

Cable television companies have made significant investments to upgrade their cable systems to support two-way high-speed Internet access, and those companies have contended that they should be able to contract with a single ISP to provide such service to all of their cable customers (although at least two leading cable companies have subsequently shifted their positions, as discussed below). Many Internet Service Providers, initially led by America Online, have contended that owners of cable systems should be required to permit unaffiliated, third party ISPs to offer high-speed Internet service to the cable customers. Many consumer and public interest advocacy groups have actively argued in favor of requiring cable companies to allow third party access. This issue is discussed in greater detail in Part IV below.

3. Use of “Leased Access” Cable Channels to Provide Internet Service

A small ISP, Internet Ventures, Inc. (“IVI”), among others, has contended that it should have a right under the “leased access” provisions of the 1984 Cable Act to obtain access to one or more channels on a cable system for the purpose of transmitting high-speed Internet content to customers. The cable system owners contend that under the 1984 Act, the “leased access” channels can only be used by “video programmers” and IVI does not fit within either the language or statutory intent of the Act.

IVI’s approach differs significantly from that of many other ISP’s seeking to provide cable-based Internet access. While AOL and other ISP’s have worked to gain access to upgraded, two-way capable cable systems, IVI is pursuing a different approach to Internet access over cable systems. IVI proposes to provide high-speed *downstream* Internet content, with the upstream side completed using a standard phone line and modem (called a “telco return” approach). Although not as fast, efficient, or desirable as the regular two-way cable modem service offered by upgraded cable systems, IVI’s approach can – in theory – be offered over *any* cable system, whether or not it has been upgraded.

IVI’s business model was to lease a single cable channel from a cable system, and to place downstream data intended for IVI’s customers onto that single channel. IVI contended that it should be able to lease the channel under the 1984 Cable Act, which requires that cable companies make available “leased access” channels to promote competition and diversity in leased access programming. All major cable companies approached by IVI refused to lease IVI a

cable channel, on the asserted bases that IVI did not meet the definition of “video programmer” under the 1984 Cable Act.

IVI filed a petition for declaratory ruling with the FCC asking that it order cable systems to permit IVI to lease a channel for downstream Internet content. After receiving comments from the public, the FCC on February 18, 2000, denied IVI’s petition, concluding that the leased access channels were only available to “video programmers” and that a Internet service provider (such as IVI) did not meet the statutory definition of “video programmer.”⁷³ IVI does not appear to be pursuing its petition further.

B. DSL-specific issues

The broadband issues relating to Internet access over DSL systems generally involve the ability of “competing local exchange carriers” (“CLECs”) to compete with “incumbent local exchange carriers” (“ILECs”). Under the Telecommunications Act of 1996, ILECs are required to make certain pieces, or “elements,” of their network available to CLECs to enable CLECs to compete with the ILECs in the provision of local phone service and Internet access service. The policy questions center around whether the ILECs are fully complying with their statutory and regulatory obligations to act properly towards, and compete fairly with, the CLECs.

The first four of the DSL-specific issues set out below reflect CLEC challenges to ILEC actions, and are already the subject of current legal or regulatory proceedings at the state and/or federal levels. As a general matter, the CLECs are not seeking major changes in laws or regulations, but instead are seeking stronger and faster enforcement of existing regulations and statutes.

The fifth issue is not a complaint of the CLECs against the ILECs, but instead reflects the arguments made by ILECs that they should not be regulated more heavily than are cable system operators that provide Internet access. Under proposals that ILECs have supported, certain requirements under which CLECs have been able to offer DSL service would be modified or eliminated.

The competitive and at times hostile nature that has characterized most ILEC-CLEC relations over the past few years may be changing. In recent months, many CLECs have struck deals with ILECs for line sharing, as discussed below. More fundamentally, ILEC Verizon (formerly known as Bell Atlantic) and CLEC NorthPoint Communications have announced an agreement to merge their DSL operations into one nationwide venture.⁷⁴ Similarly, ILEC SBC and

⁷³ Memorandum Opinion and Order, *In the Matter of Internet Ventures, Inc.*, File No. CSR-5407-L (Feb. 18, 2000), <<http://www.fcc.gov/Bureaus/Cable/Orders/2000/fcc00037.doc>>.

⁷⁴ “Verizon and NorthPoint to Merge DSL Businesses to Create Leading National Broadband Company,” Press Release, Aug. 8, 2000, at <http://www.northpointdsl.com/about_press.asp?PressReleaseID=1152>.

CLEC Covad have announced a strategic alliance to sell DSL services nationwide.⁷⁵ Both ILECs and CLECs are increasingly focused on competing in the broadband arena with cable modem providers.

1. Access by CLECs to "Collocation Space" within ILEC Central Offices

CLECs have generally contended that the ILECs are failing to comply with their statutory and regulatory obligations to provide "collocation space" – space inside the ILECs' central switching offices – in which CLECs need to install switching and other equipment necessary to provide their services. CLECs contend that ILECs (a) incorrectly claim that there is no available collocation space, (b) inappropriately require CLECs to obtain large collocation spaces just to install a single small piece of equipment, or require them to install unnecessary equipment or facilities in the collocation space, and (c) discriminate against the CLECs in terms of price of, or access to, the collocation space. The ILECs generally contend that they are fully complying with their statutory obligations, and that certain of the physical requirements are essential to the safe and reliable operation of the telephone network.

In March 1999, the FCC reviewed a number of complaints raised by the CLECs, and issued an order addressing many of the issues.⁷⁶ In that order, the FCC required (among other things) that (a) ILECs permit CLECs to collocate without leasing a large space or installing a wire cage separating the ILEC work space from that of the CLEC, (b) ILECs make additional space available to CLECs even if the primary collocation space is full, and (c) ILECs allow CLECs to tour an entire central switching office if the ILEC claims that there is no space available in the office. On March 17, 2000, the U.S. Court of Appeals for the D.C. Circuit upheld the FCC's order on all of these points.⁷⁷ In light of the FCC order and the appeals court decision favoring the CLECs, there is not at this time a strong call for federal legislation or additional FCC action to address collocation issues.

2. Access by CLECs to "Local Loops" – or Wires – into Customers' Homes and Businesses, and Unfair Competition in General

CLECs have contended that ILECs are failing to comply with their statutory and regulatory obligations to provide to CLECs fair, efficient, and nondiscriminatory access to "local

⁷⁵ "Covad and SBC Form Marketing Agreement to Deliver Broadband Nationwide," Press Release, Sept. 11, 2000, <http://www.covad.com/companyinfo/pressreleases/pr_2000/091100a_press.shtml>.

⁷⁶ First Report & Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC No. 99-48, CC Docket No. 98-147, 14 FCC Rcd 4761 (1999), <http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99048.pdf>.

⁷⁷ *GTE Service Corp. v. Federal Communications Comm.*, 205 F.3d 416 (D.C. Cir. 2000), <<http://pacer.cadc.uscourts.gov/common/opinions/200003/99-1176a.txt>>.

loops,” the physical copper wires that are used to provide telephone service (including DSL service) into homes and businesses.

To provide DSL service to a customer, a CLEC requires that an ILEC provision a “local loop” that runs between the CLEC’s equipment collocated in the ILEC’s “central office” and the customer’s home or business. CLECs have complained that ILECs have been slow and unreliable in provisioning loops, and have asserted that the ILECs provision loops for their affiliated ISPs far more quickly than they do for unaffiliated CLECs. The time required for an installation of a DSL line from a CLEC is generally at least a week or two longer than for the provisioning of DSL service by the ILEC. Part of the time difference may be explainable by the fact that ILECs typically run DSL service over local loops that already carry normal phone lines (and are therefore relatively easy to identify), while CLECs until recently were only able to provide service over previously unused wires into customers’ homes. Nevertheless, the CLECs believe that the ILECs’ slowness in provisioning the loops is unfair and discriminatory.

More generally, CLECs and independent ISPs have complained that ILECs have engaged in anticompetitive practices that include (a) ILECs pricing their retail DSL service at about the same prices they charge small CLECs and ISPs for use of a local loop (ensuring that the CLEC and/or ISP cannot underprice the ILEC), (b) ILECs giving their affiliated ISPs preferential treatment over unaffiliated ISPs, and (c) ILECs using their installation personnel to tout the price advantages of the ILEC ISP over unaffiliated ISPs.⁷⁸

The ILECs have denied these allegations. These and other issues are being considered in on-going proceedings before the FCC and the courts, and there is not at this time a strong call for federal legislation or additional FCC action to address the provisioning of local loops.

3. ILEC and CLEC Sharing of Individual Loops

On petition by CLECs and others, the Federal Communications Commission (“FCC”) has declared that ILECs must allow CLECs to provide DSL service to a particular customer *over the same wire* that the ILEC provides local phone service to the customer. Ordinary telephone wire can carry electronic signals over a broad range of frequencies. Traditional analog telephone calls are carried on a low portion of the wire's frequency spectrum, while digital DSL service is carried on a much higher portion of the electronic spectrum. Thus, voice phone service and digital DSL service can, technologically, share a single copper wire without interfering with each other. CLECs sought a requirement that ILECs allow CLECs to use the high frequency portion of local loops while the ILECs continue to provide voice service over the low frequency portions of the

⁷⁸ See, e.g., Reply Comments of the Texas Internet Service Providers Association, *In the Matter of Application of SBC Communications ... for Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-4 (filed Feb. 20, 2000), at 10-11; *The Big DSL Squeeze*, ZDNet, March 27, 2000, <<http://www.zdnet.com/filters/printerfriendly/0,6061,2473709-2,00.html>>.

same loops. ILECs objected, and contended that they are obligated only to provide entire wires to CLECs (which cost more and are slower to install than the shared spectrum of an existing phone wire).

In November 1999, the FCC agreed with the CLECs and ordered the ILECs to share their existing telephone lines with CLECs seeking to provide DSL service. Since that order, a variety of ILECs have entered into contractual arrangements with CLECs to share lines. In an action requested by the Minnesota Public Utilities Commission, US West contracted with the CLEC Covad to share lines. Similarly, US West and Rhythms NetConnection also contracted to share lines, and thereby dramatically reduced Rhythms' costs.⁷⁹ In light of these and other agreements between ILECs and CLECs, there is not at this time a call for federal legislation or additional FCC action to address line-sharing issues.

4. Structural Separation of ILEC Facility Ownership and Internet Access Operations

CLECs have contended that the most effective way to ensure that ILECs do not discriminate against CLECs (and in favor of their own Internet service providers) is to require "structural separation" between the ownership of the facilities and the ISP operations. The ILECs assert that such separation is unwarranted and is outside of the FCC's powers.

In the context of two separate merger reviews, the FCC required (as a condition for merger approval) SBC and Ameritech, and Bell Atlantic and GTE, to separate their ISPs into separate business units to ensure that CLECs can compete on a level playing field with the ILECs' ISP.⁸⁰ At the state level, the Pennsylvania Public Utilities Commission ruled that Bell Atlantic must separate its wholesale DSL and retail ISP businesses.⁸¹

In light of these developments, there is not at this time a strong call for federal legislation or additional FCC action to require structural separation.

5. Regulatory Parity between ILECs and Cable System Operators

There are legislative proposals that could directly affect the relationship between CLECs and ILECs with regard to DSL deployment. Legislation proposed in the U.S. House of

⁷⁹ <http://www.broadband-daily.com/subscription/index.htm?issue_rec=232&&article_rec=1198>.

⁸⁰ See "Summary of Conditions, Sept. 6, 1999, <http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrc9077a.html>; "Conditions for Bell Atlantic/GTE Merger," June 17, 2000, <http://www.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00221b.pdf>.

⁸¹ See News Release, Pennsylvania Public Utilities Commission, Aug. 26, 1999, <<http://puc.paonline.com/telecomm/8-26-99%20puc%20passes%20rules%20jumpstart%20comp.htm>>.

Representatives would relieve ILECs of their obligation to provide to CLECs access to the network elements necessary for the CLECs to offer DSL service.⁸² The theory behind this legislation is that (a) the cable companies do not face similar requirements as ILECs do, (b) the two industries should be treated similarly, and (c) regulation on telephone companies should be reduced (as opposed to increasing regulation on cable companies). CLECs vigorously oppose calls for “regulatory parity,” since such parity would relieve ILECs of their obligation to provide the network elements that CLECs currently receive under the Telecommunications Act of 1996.

C. The Digital Divide

Most of the policy debates related to broadband access have focused on the “last mile” of the connection between a provider and a customer's home or business. Yet an issue of equal, or even greater concern is that of the “Digital Divide.” A significant – and possibly growing – disparity exists between the telecommunications services available to affluent city and suburban dwellers, and the services within physical and financial reach of inner city and rural communities. There is a great risk that the “divide” will grow even larger as the country moves toward broadband technology. Although there is general consensus that rural and inner-city communities should have access to broadband technologies, there is little consensus on how best to accomplish the goal.

The Digital Divide itself is the subject of numerous white papers and briefing books, and this paper does not attempt to address the issue in its entirety. Two points below, however, relate to the Digital Divide and arguably directly affect broadband deployment.

1. The Digital Divide in Particular: Limitations on ILECs' Ability to Carry Internet Data Across LATA Boundaries

One way in which the Digital Divide issue arguably affects broadband deployment concerns statutory limitations on ILECs' ability to carry data across local service boundaries. In an effort to encourage competition in local telephone markets, the Telecommunications Act of 1996 prohibited ILECs from carrying long-distance telephone traffic. These provisions have been interpreted as prohibiting the ILECs from operating an Internet backbone (or any other kind of data network) that would carry data across local calling boundaries known as LATA (“Local Access and Transport Area”) boundaries. The ILECs have argued that this limitation constrains their ability to bring broadband Internet services to rural communities. The ILECs contend that with few connections to the Internet backbone available in rural communities, an Internet backbone in local markets could significantly facilitate broadband access in rural areas. This, in theory, would lead to greater broadband options for retail consumers.

⁸² “Internet Freedom and Broadband Deployment Act,” H.R. 2420, <<http://techlawjournal.com/cong106/broadband/hr2420ih.htm>>.

Competing Internet backbone providers contend that there is already sufficient backbone capacity to rural communities, and that allowing the ILECs to carry data long-distance would delay local phone competition. Viewed solely from the perspective of Internet development, the restriction on the ILECs' ability to operate backbones may well slow the introduction of broadband to rural areas. The tradeoffs, however, in terms of local telephone competition, could also be significant.⁸³

2. Exemption for Small and Rural Incumbent Telephone Companies from the Requirement that ILECs Provide Collocation Space, Loops, and Other Network Elements Essential to DSL Service

The exemption of small incumbent telephone companies from requirements applicable to larger ILECs raises another significant issue. Under the Telecommunications Act of 1996, the requirements that ILECs make elements of their network available to CLECs do *not* apply to small incumbent telephone companies, almost all of which operate in rural communities. Without that statutory requirement, CLECs cannot force many local carriers in rural areas to allow the CLECs to install equipment and offer service (as CLECs have been able to do with larger ILECs). Certain CLECs contend that broadband access will reach rural communities faster if CLECs are given that power, while the rural incumbent telephone companies contend that they will provide broadband access more quickly if they do not have to open their networks to CLECs. There are no pending legislative or regulatory proposals to address this issue.

D. The Potential Impact of the Emerging Broadband Content Distribution Model

In its current form, the Internet is an web of interconnected, overlapping networks designed to route data traffic efficiently and reliably to reach any destination on the vast web. A vitally important result of the Internet's infrastructure is that any speaker on the Internet can reach any listener. On the Internet, a lone speaker and the largest media company have roughly the same abilities to speak and be heard. This rough equality is directly threatened by changes to the infrastructure driven by broadband technologies. There is significant risk on a broadband Internet, where locally-based broadband content servers deliver broadband content quickly to consumers, the major means of broadband distribution will be the proprietary domains of large companies or wealthy speakers. Broadband technology and the content distribution technology that it has spawned could ultimately destroy the rough equality among speakers worldwide so vital to the Internet's promotion and facilitation of democracy.

⁸³ The Broadband Access Project has not attempted to evaluate the local telephone competition issues raised here.

This issue is extensively discussed in a separate paper issued by the Center for Democracy & Technology and its Broadband Access Project, entitled “The Broadband Internet: The End of the Equal Voice?”⁸⁴

⁸⁴ Jerry Berman and John B. Morris, Jr., “The Broadband Internet: The End of the Equal Voice?,” April 2000, <<http://www.cfp2000.org/papers/morrisberman.pdf>>.

IV. THE HOT BUTTON POLICY DEBATE: ISSUES RELATING TO THIRD PARTY ACCESS TO CABLE SYSTEMS

Over the past two years, the broadband issue that has garnered the greatest attention by companies, lobbyists, the media, and policy makers has been the “third party” access question (also referred to as “open access” or “forced access”). Most cable television systems that have upgraded their facilities to support transmission of two-way data have entered into exclusive contracts with one preferred Internet Service Provider (“ISP”—such as @Home or Roadrunner) to provide Internet service. In most cases, the cable systems have contracted with an ISP in which the cable system owns some stake. The most immediate effect of these exclusive arrangements is that cable customers have no choice but to obtain Internet service from the preferred ISP.

Some leading ISPs and public interest advocates have vigorously argued before the FCC, in Congress, and to state and local governments in favor of what they term “open access.” They advocate statutory or regulatory requirements that cable systems support multiple ISPs and permit unaffiliated ISPs to compete for the Internet business of cable subscribers. Cable interests vigorously oppose what they call “forced access” to cable systems, and offer rebuttal to the arguments of the “open access” camp.

Because both “open access” and “forced access” are weighted terms, this paper will use “third party access” to refer to this debate. Not only is “third party access” a more neutral term, it is also the term used by the industry and regulators in Canada, where the issue has been considered at greater length than in the United States.

*This section reviews the arguments and issues that have been at the core of this debate, but it starts with an issue that has not been a primary focus: the question of where Internet access over cable systems fits into the existing regulatory structure.

A. The Threshold Question of the Proper Regulatory Classification of Internet Service Provided over a Cable System

Although the FCC and others have sought to avoid or at least defer consideration of this issue, a logical starting point in considering third party access is to determine where Internet-service-over-cable fits into the current regulations of cable and telecommunications services.

The FCC derives its regulatory authority from the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, and different types of wire and wireless communications have generally been grouped under the titles of that Act. Telephone and data services provided over telephone facilities are regulated under Title II, which incorporates traditional common carrier rules and a broad requirement that providers of such services not discriminate among users of the services. In

contrast, video delivery services provided over cable facilities are regulated under Title VI, which does *not* include common carrier rules or a broad nondiscrimination provision.

At the core of this policy issue is the identification of the proper classification for Internet service provided over a cable facility. If such service is deemed to be a “cable service,” then the relatively limited regulations of Title VI could apply. If, on the other hand, Internet access is deemed to be a “telecommunications service” or “information service,” then relevant provisions of Title II would more likely apply. If Title II is deemed to apply, the FCC would likely be forced to reconcile or at least explain the significantly different levels of regulation imposed on Internet access over cable systems compared to Internet access over telephone systems.

In August 1999, the FCC filed a “friend of the court” brief with the U.S. Court of Appeal for the Ninth Circuit. In that brief, the Commission provided a useful summary of the arguments about the proper classification of Internet access over cable systems:

Strong arguments have been advanced in support of the argument that Internet access via cable is not a cable service. As an initial matter, . . . not every service offered over cable facilities is a “cable service” under the Communications Act. Congress first defined the term “cable service” as part of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (“1984 Cable Act”). Initially, Congress defined “cable service” as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service.” 47 U.S.C. § 522(6) (1984). For purposes of this definition, video programming means “programming provided by, or generally considered comparable to programming provided by, a television broadcast station,” 47 U.S.C. § 522(20), while “other programming service” means “information that a cable operator makes available to all subscribers generally.” 47 U.S.C. § 522(14).

As the legislative history of the 1984 Cable Act makes clear, the original definition of “cable service” did not include the types of services that are now commonly associated with Internet access. The House Report on the legislation emphasized that the Act’s definition of “cable service” restricted subscriber interaction to the selection of categories or options provided by the cable operator or the programming service provider: “By contrast, interaction that would enable a particular subscriber to engage in the off-premises creation and retrieval of a category of information would not fall under the definition of cable service.” H.R. Rep. No. 934, 98th Cong., 2d Sess. 42-43 (1984) (“House Report”). In other words, under the 1984 Cable Act, “services providing subscribers with the capacity to engage

in transactions or to store, transform, forward, manipulate, or otherwise process information or data would not be cable services.” Id. at 42. The House Report on the statute went on to identify several services that would not be cable services, including “shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission [of] non-video data and information not offered to all subscribers, data processing, video conferencing, and all voice communications.” Id. at 44.[footnote omitted]

In 1996, Congress amended the statutory definition of cable service. As amended, the Communications Act defines cable service as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.” 47 U.S.C. § 522(6) (emphasis added). AT&T and TCI have argued that Congress, by adding the words “or use,” intended to expand the definition of “cable service” to include the wide range of interactive services encompassed by Internet access. See TCI Order ¶ 82.

The legislative history of the 1996 Telecommunications Act provides some support for AT&T's and TCI's position. The Conference Report on the statute declares: “The conferees intend the amendment [of the definition of cable service] to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.” S. Conf. Rep. No. 230, 104th Cong., 2d Sess. (1996) (“Conference Report”) (emphasis added). The Conference Report's references to “information services” and “enhanced services” suggest that the amended definition of “cable service” may include the types of interactive cable broadband services that were previously excluded. The statute defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). And the FCC's rules define “enhanced services” to include services that “involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a).

On the other hand, notwithstanding the 1996 amendment, one basic aspect of the definition of cable service remains unchanged: A service cannot be a “cable service” unless it qualifies as “video programming” or “other programming service.” The 1996 Telecommunications Act did not alter the definitions of “video programming” or “other programming service.” Unless Internet access fits one of these definitions, it cannot qualify as “cable service.”

Proponents of the view that Internet access is a form of “cable service” generally do not argue that it is a form of “video programming” comparable to that offered by a television broadcast station (see 47 U.S.C. § 522(20)), but instead contend that Internet access fits the definition of “other programming service” -- that is, “information that a cable operator makes available to all subscribers generally.” 47 U.S.C. § 522(14). But it is not clear that Internet access meets this description. Arguably, the “information” that an individual subscriber obtains via Internet access -- for example, E-mail or access to a specific web site chosen by the subscriber -- is provided only to that particular subscriber. In that respect, this information may not be made “available to all subscribers generally.”

AT&T and TCI appear to argue that a cable operator makes information “available to all subscribers generally” simply by providing subscribers with the capability to gain access to the Internet. Under this broad statutory interpretation, however, “other programming service” would arguably include any transmission capability that enables subscribers to select and receive information, including basic telephone service. And Congress stated that its 1996 amendment of the definition of cable service was not intended to eliminate the longstanding regulatory distinction between telecommunications service and cable service: “This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.” Conference Report at 169.

A number of parties have argued that Internet access services “are information services or telecommunications services covered by Title II” of the Communications Act. TCI Order ¶ 83. Currently, when Internet access service is provided over telecommunications facilities, the Commission treats that service as an information service. See Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501, 11536-40 (¶¶ 73-82) (1998) (Exhibit 5). If the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service.

Alternatively, Internet access over cable could be classified as the sort of “advanced telecommunications capability” identified by section 706 of the 1996 Telecommunications Act. Functionally, Internet access provided through cable modems is no different from the broadband capability provided over other facilities such as the wireline telephone network, wireless telecommunications systems, or satellite facilities. If the

Commission were to treat cable modem service as “advanced telecommunications capability,” it would have the opportunity to develop a coherent regulatory policy that took into account the full range of broadband service providers, including cable systems. Local franchising authorities would have no such opportunity because they have no regulatory authority over broadband service providers other than cable systems. Thus, local regulation of a cable system's broadband services as “cable services” might pose a significant risk of regulatory disparity with respect to all other broadband service providers. Any such disparity might undermine the objectives of section 706 by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans.

More generally, on a conceptual level, an argument can be made that Internet access is more appropriately characterized as an information or telecommunications service rather than a cable service. At the most basic level, there are two kinds of communications service networks: (1) broadcast (one-to-many) networks, in which the distributor chooses the content and sends it to all customers; and (2) switched (one-to-one) networks, in which the customer chooses the content and sends it to the person(s) of his or her choice. The first type of network best describes cable service; the second type of network most accurately depicts telecommunications and information services. Some have argued that Internet access more closely resembles the switched network. However, the Commission has not yet conclusively resolved the issue.⁸⁵

As the FCC noted, it has not “conclusively resolved” the question of the proper classification of Internet access over cable systems. Indeed, the FCC has specifically avoided the issues, despite being directly asked to determine proper classification in both the merger review concerning the AT&T-TCI merger, and in the “Advanced Services” proceeding pursuant to 47 U.S.C. § 706. But, to date, the agency has adopted a “hands off” approach to third party access, and has declined to address the regulatory classification issue.

As mentioned above, a recent decision of the Ninth Circuit Court of Appeals, however, may force the FCC to address the issue of regulatory classification. In that case (in which the FCC filed the *amicus curiae* brief quoted above), the Court did directly address the question. The case grew out of the proposed merger of AT&T and TCI. The City of Portland and the County of Multnomah, Oregon, responded to the merger by refusing to grant an AT&T/TCI request for a change in control, unless AT&T agreed to allow third party access on its cable system. AT&T and TCI filed suit asking the federal district court to declare the Portland and Multnomah County actions illegal and unauthorized. The district court ruled against AT&T, and held that the local

⁸⁵ Brief of the Federal Communications Commission as Amicus Curiae, *AT&T Corp. v. Portland*, No. 99-35609 (9th Cir.) (filed Aug. 16, 1999), <<http://techlawjournal.com/courts/portland/19990816fcc.htm>>.

agencies did have the authority to impose a third party access obligation. AT&T has appealed the case to the U.S. Court of Appeals for the Ninth Circuit, which heard oral argument in November 1999.

The district court's decision focused on whether the actions of the Portland local government were preempted by actions or positions taken by the FCC and the court concluded that Portland's actions were not preempted. During oral argument on appeal, however, the Ninth Circuit judges pressed the parties about the regulatory classification issue discussed above. Before the lower court, both Portland and AT&T had asserted that the Internet service at issue was a "cable service" subject to the federal regulatory regime applicable to cable systems. On appeal, the judges of the Ninth Circuit court expressed skepticism about the assumption – made by both parties – that the "cable service" classification was appropriate.

On June 22, 2000, in a well-reasoned and careful decision, the Ninth Circuit held that Internet service delivered over cable systems was a telecommunications service, *not* a cable service.⁸⁶ In reaching this decision, the court closely reviewed the statutory definitions of the different types of service, as well as the practical reality of what service a cable modem provider is actually offering. The court's analysis focused on @Home, the cable modem service provider at issue in the *AT&T v. Portland* case:

Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.⁸⁷

Based on this conclusion, the appeals court decided that Portland does *not* have authority to order third party access.

Superficially, such a result might appear to be a victory for the cable companies. It greatly lessens the likelihood that localities across the country will be able to successfully impose third party access requirements on cable carriers. If the Ninth Circuit's analysis is followed by other courts around the country, then there is little risk that a regulatory patchwork quilt will arise, consisting of different and possibly conflicting local regulation on the third party access issue.

⁸⁶ *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), <<http://techlawjournal.com/courts/portland/20000622op.htm>>.

⁸⁷ *Id.* at 878.

On the other hand, the ruling that the Internet service is not a “cable system” but a “telecommunication service” greatly increases the pressure on the FCC to address the regulatory classification issue – and the third party access issue – directly. Assuming the agency agrees that Internet access over cable is most fairly viewed as a telecommunications service, then the FCC will be forced either to consider greater regulation of such service or to explain and defend specific reasons why such regulation is not appropriate.

It appears that the Ninth Circuit decision has had the expected impact on the FCC. On September 28, 2000, the agency issued a Notice of Inquiry that will address the third-party access issue.⁸⁸

Although not directly relevant to the classification of cable Internet access under American statutes and regulations, in 1996 the Canadian Radiotelevision & Telecommunications Commission (the “CRTC,” Canadian equivalent to the FCC) confronted and resolved a directly analogous issue. The CRTC determined that under the relevant Canadian statutes, Internet service and other data delivery over a cable system should be treated and regulated as a telecommunication service.⁸⁹ The CRTC thus subjected the Canadian cable industry to the type of tariff-based regulation that applies to Canadian telephone companies.

B. The Core Arguments in the Third Party Access Dispute

At the highest level, advocates for “open access” have argued that there is a risk that a handful of cable company-owned ISPs (primarily @Home and Roadrunner) could come to dominate the provision of broadband access to consumers. They contend that this could lead to fundamental negative changes in the Internet and reduce the free flow of information and opinions on the Internet. Their contentions include:

- without “open access,” the leading cable-affiliated ISPs, @Home and Roadrunner, will dominate the provision of broadband Internet access to consumers across the country;
- if consumer broadband access is dominated by a handful of ISPs, the very nature of today's primarily narrowband Internet (offered by thousands of ISPs across the country, and characterized by openness, innovation, and aggressive price competition) would dramatically and negatively change;
- cable ISPs will effectively have monopoly power over consumers' broadband access;

⁸⁸ “Federal Communications Commission Notice of Inquiry FCC 00-355”, Adopted September 28, 2000. <<http://www.fcc.gov/Bureaus/Miscellaneous/Notices/2000/fcc00355.pdf>>.

⁸⁹ Regulation of Broadcasting Distribution Undertakings that Provide Non-Programming Services, No. 96-1, Canadian Radiotelecommunications & Telephone Commission, Jan. 30, 1999, <http://www.crtc.gc.ca/ENG/telecom/decision/1996/d961_0.txt>.

- cable ISPs would be able to act as “gatekeepers” over the Internet, and could limit consumers' ability to reach the universe of content that is now available on the Internet, effectively censoring the speech that consumers can receive;
- cable ISPs could restrict or censor the content and speech that consumers would be allowed to post onto the Internet;
- without vibrant competition in the broadband marketplace, cable ISPs could price broadband access service at artificially high levels;
- consumers that preferred content offered by non-cable ISPs would have to pay both their cable ISP and the third party ISP for access to that content;
- both content and technology innovation on the Internet would be stifled;
- cable ISPs would enter into preferred relationships with national advertisers and category-specific vendors, and unaffiliated vendors (especially local vendors) would significantly less access to broadband consumers; and
- more generally, the cable ISPs would select preferred content providers (for news, for example), and alternative content sources would not be able to provide broadband content as quickly or reliably.

In opposition, the cable industry contends that the government should continue to refrain from regulating the Internet, and that “forced access” would significantly impede and delay the deployment of broadband access facilities across the country. Their contentions have over the past two years included:

8. the entire broadband market is in its infancy, with cable companies having less than 1.5 million customers (as opposed to more than 20 million customers of AOL), and government regulators should allow the market to grow and develop unhindered by regulations and requirements;
9. to support Internet services, cable systems must invest in a significant upgrade of their facilities, and regulators should not deprive the cable systems of the benefit of that investment;
10. if government regulators require cable systems to permit competing ISPs onto the cable facilities, investment on Wall Street will dry up and cable companies will be unable to afford the necessary upgrade to the cable facilities;

11. there is vibrant competition to provide broadband access, and the government should not favor one competitor over another;
12. consumers will not be forced to obtain broadband service from a cable company, and will instead be able to obtain high-speed service from DSL, wireless, and satellite providers;
13. competition from other access technologies will constrain cable's ability to charge higher than competitive prices;
14. cable operators have committed to permitting cable subscribers to reach the entire Internet (including, for example, AOL's content), so that consumers' Internet access will not be censored or restricted;
15. the government should not begin regulating the Internet, except to respond to fraud or crime;
16. any sort of "open access" regulation or statute would unavoidably lead to a morass of litigation and/or complex regulatory proceedings; and
17. forcing cable companies to carry permit unaffiliated ISPs to deliver services over the cable networks would violate the cable companies' First Amendment rights.

C. The Evolution of the Policy Debate

Since as early as 1998, public interest advocates, ISPs, cable companies, and other Internet interests have engaged in an aggressive debate concerning the appropriateness and viability of requiring cable companies to open their networks to unaffiliated ISPs. It was suggested early in the debate that cable systems simply could not, as a technical matter, support more than one ISP. Today, however, most acknowledge that a cable system can support multiple ISPs. Although some important technological issues remain, most of the debate over the past year focused on non-technological concerns.

Two major shifts have occurred in the alignment of companies in the different debate camps. Originally, AOL was one of the leading companies specifically calling for government action to require third-party access, and AT&T was allied with other cable companies (including Time Warner) in defending their plans to offer only a single ISP over their cable systems.⁹⁰ During the latter half of 1999, however, AT&T publicly endorsed the concept of voluntarily opening its cable networks to unaffiliated ISPs. On December 6, 1999, AT&T submitted a letter with others to FCC Chairman Kennard in which AT&T committed to allow "multiple" ISPs to offer broadband services over its systems (although AT&T would not actually implement third

⁹⁰ See, e.g., AT&T's and TCI's Joint Reply To Comments And Joint Opposition To Petitions To Deny Or To Impose Conditions, Application of AT&T and Tele-Communications, Inc., FCC Docket No. 98-178 (filed Nov. 16, 1998), at 40-43.

party access until the expiration of certain exclusive contracts in 2002 or later).⁹¹ By making this commitment, AT&T broke ranks with other cable companies that continued to resist the possibility of unaffiliated ISPs offering service over their cable systems.

Early in 2000, AOL and Time Warner announced their planned merger, and announced a shift of position for both companies. Together, the companies pledged that they would voluntarily open the Time Warner cable systems to “multiple” unaffiliated ISPs. At the same time, AOL indicated that it no longer advocated government action to force “open access.”

More recently, some other cable companies have moved toward the “voluntary open access” position. According to published reports, both Comcast and Cox⁹² have committed to open their systems when certain exclusive contracts expire.⁹³ Other cable companies may follow suit.

Thus, there are now three camps in the debate: (1) advocates of government mandated open access, (2) proponents of voluntary open access, and (3) those that oppose government action but also have not agreed to open access voluntarily. The primary focus of the debate has shifted from *whether* there will be third party access on most major cable systems, to *whether* such access will be mandated and *how* will access will be implemented and monitored.

1. The Position of the Federal Communications Commission

To date, the FCC has generally sided with the cable companies, in allowing the marketplace to function without regulatory intervention. In January of 1999, the FCC completed its first detailed analysis of the advanced services market, including high-speed access to the Internet. The Commission concluded that the broadband market was very new, that different broadband technologies were being deployed across the country, that regulatory action could slow the deployment of broadband services, so there was no pressing need for action at this time.⁹⁴ The FCC indicated that it would continue to monitor the developments in the market.⁹⁵ It reaffirmed this position when it approved the proposed AT&T/TCI merger without imposing any third party access requirements.⁹⁶

FCC Chairman William Kennard has repeatedly stated his opposition to intervention in the broadband market. He has asserted that instead of a monopoly in broadband, there is a “no-

⁹¹ AT&T’s letter is available at <<http://techlawjournal.com/broadband/19991206let.htm>>.

⁹² Comcast and Cox are the third and fourth largest cable companies in the U.S. behind AT&T and Time Warner.

⁹³ “Comcast Quietly Pledges to Open Cable to Rival ISPs,” *Communications Daily* (Mar. 24, 2000).

⁹⁴ See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, 14 FCC Rcd. 2398, 2415-24 (1999).

⁹⁵ *Id.* at 2449.

⁹⁶ *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc. to AT&T Corp.*, CS Docket No. 98-178, Memorandum and Order, 14 FCC Rcd. 3160, 3207 (1999).

opoly” since broadband has not yet been deployed to any significant extent. Kennard has also asserted that the stepped up action of the ILECs in deploying DSL came about in response to competition from cable modem services.

More recently, FCC officials have affirmatively endorsed the concept of “openness” for cable systems, but have indicated that the FCC hopes that the marketplace will achieve openness without government intervention.⁹⁷ The officials have said that “[i]f market forces fail and cable becomes the dominant means of Internet access, regulation might then be necessary to promote competition.”⁹⁸

Most recently, as discussed above, the decision of the U.S. Court of Appeals for the Ninth Circuit has effectively forced the FCC to initiate a formal proceeding to consider the issues surrounding third party access. Within days of the Ninth Circuit decision, the FCC announced that it would initiate a proceeding to consider the third party access issues.⁹⁹ As mentioned above, the FCC recently issued a Notice of Inquiry (“NOI”), although the fact that the FCC is moving forward with an NOI rather than a Notice of Proposed Rulemaking suggests that the agency has not reached any conclusion as to whether affirmative regulation would be appropriate. In an accompanying press statement, FCC Chairman Kennard summarized his current thinking on the third-party access question:

I have strongly advocated a policy of regulatory restraint in the cable modem services market. I have been patient in allowing the marketplace time to develop, while monitoring it closely to assess its openness. It is unclear, however, whether a marketplace solution will develop absent some form of intervention. Through this inquiry, we need to determine whether a regulatory response is appropriate to ensure that this exciting new technology develops the open competition and innovation that we cherish in the Internet.¹⁰⁰

2. Proposals in Congress

A variety of bills pending in Congress address broadband issues, but most are focused on removing some of the regulations under which ILECs operate. Five bills could have direct bearing on the third party access issue. Three of these five would mandate third party access, while two would strip the FCC of authority to mandate third party access:

⁹⁷ “FCC Cable Chief Says “Open” Internet is Primary Goal; Cites Agreement of Consumers and Industry,” Press Release, Nov. 9, 1999, <http://www.fcc.gov/Bureaus/Cable/News_Releases/1999/nrcb9018.html>.

⁹⁸ *Id.*

⁹⁹ “FCC Chairman to Launch Proceeding on ‘Cable Access,’” Press Release, June 30, 2000, <http://www.fcc.gov/Bureaus/Cable/News_Releases/2000/nrcb0017.html>.

¹⁰⁰ Statement of Chairman William E. Kennard Concerning Notice of Inquiry into High-Speed Internet Service, Sept. 28, 2000, <<http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek077.html>>.

H.R. 1685, The Internet Growth and Development Act and **H.R. 1686, The Internet Freedom Act**. Both of these bills declare that “broadband access transport providers” must offer unaffiliated ISPs the same terms that are offered to affiliated ISPs, and must not otherwise favor affiliated ISPs. Both were introduced by Reps. Goodlatte and Boucher on May 5, 1999, and were referred to the Judiciary Committee and the Commerce Committee, which in turn referred the bills to its Subcommittee on Telecommunication, Trade and Consumer Protection. The Judiciary Committee held a legislative hearing on June 30, 1999.

H.R. 2637, The Consumer and Community Choice in Access Act. The bill would require cable companies that provide Internet access to allow third party ISPs open access to the cable plant. It would also empower the FCC to set financial and technical terms for such third party access, should the cable companies fail to do so. The bill was introduced on July 29, 1999, by Rep. Blumenauer, and was referred to the Commerce Committee, which in turn referred the bill to its Subcommittee on Telecommunication, Trade and Consumer Protection.

H.R. 2420, The Internet Freedom and Broadband Deployment Act of 1999. The bill would deprive the FCC and state and local authorities of regulatory authority over high-speed data service or Internet access services. The bill was introduced by Rep. Tauzin on July 1, 1999, and was referred to the Commerce Committee, which in turn referred the bill to its Subcommittee on Telecommunication, Trade and Consumer Protection.

S. 1043, The Internet Regulatory Freedom Act of 1999. The bill states that U.S. policy is to assure that all Americans have access to advanced Internet services at affordable rates by eliminating regulation that impedes the competitive deployment of advanced broadband data networks. The bill specifies that nothing in this Act grants authority to the FCC with respect to: (1) the provision of Internet services, (2) technical standards or specifications for the provision of Internet services, or (3) the imposition of wholesale discount obligations on bulk offerings of advanced services. The bill was introduced by Sen. McCain and referred to the Committee on Commerce, Science and Transportation.

In addition to these proposals, other bills have been introduced that would affect broadband deployment, but which would not directly affect the third party access issue. For example, S. 877, The Broadband Internet Regulatory Relief Act, introduced by Senator Brownback, would remove the FCC’s ability to impose regulation on DSL service, in an effort to promote DSL deployment in rural areas. S. 2307, The Rural Broadband Enhancement Act, introduced by Senator Dorgan, would make loans available to companies seeking to bring broadband services to rural areas. Interestingly, S. 2307 appears to assume that all Internet service (whether over cable, DSL, or another technology) is a “telecommunications service.”

3. *Actions by State and Local Governments*

State and local governments have been an active battleground in the fight over third party access, typically in the context of reviewing AT&T's proposed mergers with TCI and/or MediaOne (or a similar cable company transaction that often requires approval or consent from local cable regulatory authorities). The local jurisdiction that has garnered the most attention has been Portland, Oregon. As described above, Portland imposed a third party access requirement as a condition of approval of AT&T's merger.

The majority of jurisdictions – including major cities such as Los Angeles and Miami – have rejected calls to impose a third party access requirement.¹⁰¹ San Francisco approved the AT&T-TCI merger without specific conditions (though it did adopt a policy of supporting third party access). Some jurisdictions have included a condition on the merger that allows the local regulator to reconsider the access issue if Portland is ultimately successful in its efforts to force third party access.¹⁰²

However, a small but growing number of jurisdictions have imposed third party access requirements on the merger, including Broward County, Florida, Fairfax City, Virginia, Cambridge, Massachusetts, and St. Louis, Missouri.¹⁰³ As in Portland, AT&T and other cable companies have brought suits to challenge some of the local actions.¹⁰⁴ Also as in Portland, the district courts that have addressed the issues to date have ruled against the cable interests.¹⁰⁵

The decision by the U.S. Court of Appeals for the Ninth Circuit in the *AT&T v. Portland* case, however, is likely to have a significant impact on any efforts by local authorities to impose third party access. As discussed more fully above, the Ninth Circuit concluded that the local government did *not* have the authority to impose a third party access requirement on a cable company. Its analysis, and the fact that the FCC is undertaking its Notice of Inquiry, greatly strengthens the argument that local governments lack the power to impose third party access.

In addition to action by local governments, ballot initiatives or state legislative proposals to require third party access have been proposed in a number of states, including Colorado,

¹⁰¹ See, e.g., "Open Cable Requirement Dies in Florida," CNET News (Oct. 19, 1999), <<http://news.cnet.com/news/0-1004-200-920007.html?tag=st.ne.1002>>.

¹⁰² See, e.g., "AT&T wins San Francisco cable access showdown," CNET News (July 26, 1999), <<http://news.cnet.com/news/0-1004-200-345360.html?tag=st.ne.1002>>.

¹⁰³ See, e.g., "Virginia city supports open access," CNET News (Sept. 29, 1999), <<http://news.cnet.com/news/0-1004-200-367136.html?tag=st.ne.1002>>.

¹⁰⁴ See, e.g., "AT&T sues over Florida open access ruling," CNET News (July 26, 1999), <<http://news.cnet.com/news/0-1004-200-345349.html?tag=st.ne.1002>>; "Comcast sues Broward County, Florida, over open access," CNET News (July 21, 1999), <<http://news.cnet.com/news/0-1004-200-345168.html?tag=st.ne.1002>>.

¹⁰⁵ See, e.g., "Judge dismisses parts of Comcast lawsuit," CNET News (Feb. 15, 2000), <<http://news.cnet.com/news/0-1004-200-1550612.html?tag=st.ne.1002>>.